UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SPRINT SPECTRUM L.P., et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	**Civil No. 02-38-P-H**
	)	
THE TOWN OF YORK, et al.,	)	
	)	
Defendants	)	

MEMORANDUM DECISION AND ORDER
ON DEFENDANTS' MOTION TO CONDUCT LIMITED DISCOVERY (Docket No. 15)

Following a conference with counsel held April 18, 2002, counsel were ordered to brief the following questions:

> (1) Should the defendants be permitted to designate an RF [radio frequency] expert and to present his/her written report as evidence in this proceeding outside of the administrative record bearing on the question whether a substantial coverage gap exists in the absence of construction of a monopole tower in the R-6 district in northern York? (2) If not, should the defendants be permitted nevertheless to depose, and thereby now challenge the opinions of, the RF experts presented by the plaintiffs during the administrative proceedings?

Report of Conference of Counsel and Revised Scheduling Order ("Report") (Docket No. 11) at 2. With the benefit of the resultant briefs, I answer question No. 1 in the affirmative and conclude that the defendants should be permitted to designate their own RF expert.

The briefs address two overarching points: (i) whether, as a matter of law, discovery is appropriate in this type of case and (ii) whether, in any event, discovery is appropriate on the particular facts presented. *See generally* Defendants' Motion and Incorporated Memorandum of Law

To Conduct Limited Discovery ("Motion") (Docket No. 15); Plaintiffs' Opposition to Defendants' Motion To Supplement the Administrative Record With Limited Discovery, etc. ("Opposition") (Docket No. 17).

On the first point, the defendants concede that discovery is inappropriate as to the question whether the zoning decision in question was supported by substantial evidence – an inquiry that, by its nature, generally entails scrutiny of the administrative record alone. *See* Motion at 3-4. They seek discovery as to the question whether the zoning decision in question prohibited, or had the effect of prohibiting, personal wireless services in violation of the Telecommunications Act of 1996 (the "TCA") – an inquiry as to which they argue persuasively that limited discovery is permissible and even in some cases essential. *See id*. at 4-7*; see also, e.g., Town of Amherst v. Omnipoint Communications Enters., Inc*., 173 F.3d 9, 16 n.7 (1st Cir. 1999) ("In considering whether substantial evidence supports the agency decision, the court is acting primarily in a familiar 'review' capacity ordinarily based on the existing record. By contrast, whether the town has discriminated among carriers or created a general ban involves federal limitations on state authority, presenting issues that the district court would resolve *de novo* and for which outside evidence may be essential.") (citations omitted).[1]

The tougher question is whether the limited discovery sought should be permitted on the facts of this case. Since October 7, 1999, when the plaintiffs first advised the defendants of their intention to seek to build a tower on a site in which such uses were expressly forbidden, the effective-prohibition challenge has been central to their strategy. *See* Record, Tabs A & B. By December

[1] The plaintiffs correctly point out that this observation is *dictum*. *See* Opposition at 8. However, they cite no case holding that consideration of extra-record materials is generally or always inappropriate in the context of an effective- prohibition claim under the TCA. The case of *Omnipoint Communications, Inc. v. Town of Guilford*, 156 F. Supp.2d 212 (D. Conn. 2001), on which they heavily rely, *see id*. 7-8, is distinguishable inasmuch as it pertains to a substantial-evidence claim, *see Guilford*, 156 F. Supp.2d at 218-20.

2001, when the plaintiffs submitted materials to the zoning board of appeals ("BOA"), the claim was manifest. *See id*., Tab Q. At a January 23, 2002 public hearing, when a BOA member moved to continue the plaintiffs' application and "require more technical information [relevant to the effective-prohibition claim] by our own engineer . . . to be paid by the applicant," the BOA voted the motion down. *Id*., Tab X at 48-50. Nonetheless, the plaintiffs had agreed to provide such funding only on condition that there be reasonable limitations on the scope of the work, a cap on costs and that "we . . . have some say in the Town's selection of the consultant" in the form of presentation of a list of consultants from which the defendants could pick. *Id*. at 49. Prior to the negative vote, a BOA member commented, "I think letting them [sic] choose from a short list of hand-picked consultants is essentially useless to us." *Id*. at 50.

The defendants argue, *inter alia*, that "[i]f a municipality is required to retain experts during the course of hearings, to challenge or rebut an applicant's [claim] that a proposed site is the only feasible site in the Town before denying an application, this will subject municipalities to great and unreasonable costs." Motion at 5. This point is well-taken. It no doubt generally is in the interest of applicants, who bear the "heavy burden" of proving effective prohibition if they ultimately choose to press such a claim in court, *see Town of Amherst*, 173 F.3d at 14, to raise that issue during the course of municipal proceedings. But municipalities should not thereby become obliged to dig into their pockets to counter with their own expert(s) or risk forfeiting the chance to present an effective-prohibition defense should the issue wind up in court. Of course, in this case, the plaintiffs made an offer to pay for an expert, and the defendants refused. Had that offer been unconditional, I likely would not permit limited discovery now. However, the plaintiffs placed restrictions on the offer, including their request to "have a say" in the choice of a consultant, that the BOA reasonably viewed as unacceptable.

In accordance with my April 18, 2002 order, Report at 2, the defendants shall designate their RF expert and file his/her report within three business days of the date hereof, and the plaintiffs shall counter-designate an RF expert and file his/her report within five business days thereafter.

So ordered.

Dated this 22nd day of May, 2002.

_____
David M. Cohen
United States Magistrate Judge

STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 02-CV-38

SPRINT SPECTRUM LP, et al v. YORK, TOWN OF, et al Filed: 02/21/02
Assigned to: JUDGE D. BROCK HORNBY
Demand: $0,000 Nature of Suit: 440
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 42:1983 Civil Rights Act

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	DAVID P. LITTELL, ESQ. (See above) [COR]
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TOWN OF YORK BOARD OF APPEALS defendant	MARK V FRANCO (See above) [COR LD NTC]
TOWN PLANNER OF THE TOWN OF YORK defendant	MARK V FRANCO (See above) [COR LD NTC]
TOWN OF YORK PLANNING BOARD MEMBERS defendant	MARK V FRANCO (See above) [COR LD NTC]
TOWN OF YORK APPEALS BOARD MEMBERS defendant	MARK V FRANCO (See above) [COR LD NTC]